

Dan R. Waite, Bar No. 4078
 DWaite@lewisroca.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
 3993 Howard Hughes Parkway, Suite 600
 Las Vegas, NV 89169
 Tel: 702.949.8200
 Fax: 702.949.8398

Greg C. Noschese (Texas State Bar No.: 797164)
(Admitted Pro Hac Vice)
 Natalie A. Sears (Texas State Bar No.: 24098400)
(Admitted Pro Hac Vice)

MUNSCH HARDT KOPF & HARR, PC
 500 N. Akard Street, Suite 3800
 Dallas, TX 75201
 Tel: (214) 855-7500
 Fax: (214) 855-7584
 gnoschese@munsch.com
 nsears@munsch.com

*Attorneys for Colliers International North Texas, LLC,
 Robert M. Acuff, Thomas Lee Sutherland, Steve
 Everbach and Colliers Nevada, LLC*

UNITED STATES DISTRICT COURT

THE DISTRICT OF NEVADA

SOMERSET AT SAHARA, LLC, a Nevada
 limited liability company;

Plaintiff,

vs.

COLLIERS INTERNATIONAL NORTH
 TEXAS, LLC, a Texas Limited Liability
 Company; ROBERT M. ACUFF, an
 individual; THOMAS L. SUTHERLAND, an
 individual; COLLIERS NEVADA, LLC, a
 Nevada Limited Liability Company; STEVE
 EVERBACH, an individual;
 HEALTHMEDICA, INC., a California
 Corporation; UNIFUND, INC., a California
 Corporation; SAN FRANCISCO MEDICAL
 INSTITUTE, INC., a California Corporation;
 NATHAN SASSOVER, an individual;
 FLOORESCENCE, INC., a California
 corporation; DOE INDIVIDUALS 1 through
 40; DOE EMPLOYEES 1 through 40; DOE
 COMMERCIAL REAL ESTATE
 BROKERS 1 through 40; and ROE
 CORPORATIONS 1 through 40; DOE
 NEGLIGENCE EMPLOYERS 1 through 40;
 DOE NEGLIGENCE EMPLOYEES 1 through

Case No. 2:22-cv-00486-JCM-NJK

**DEFENDANTS COLLIERS
 INTERNATIONAL NORTH TEXAS,
 LLC, ROBERT M. ACUFF, THOMAS L.
 SUTHERLAND AND COLLIERS
 NEVADA, LLC'S REPLY IN SUPPORT
 OF MOTION TO DISMISS
 PLAINTIFF'S COMPLAINT FOR
 FAILURE TO STATE A CLAIM
 PURSUANT TO FEDERAL RULE OF
 CIVIL PROCEDURE 12(b)(6)**

40; ROE NEGLIGENT COMMERCIAL
REAL ESTATE BROKERS 1 through 40.

Defendants.

Defendants Colliers International North Texas, LLC (“Colliers Texas”), Colliers Nevada, LLC (“Colliers Nevada”), Robert M. Acuff (“Acuff”) and Thomas L. Sutherland (“Sutherland”) (collectively, “Colliers Defendants”), submit this reply in support of their Motion to Dismiss [ECF No. 9] Plaintiff Somerset at Sahara, LLC’s (“Plaintiff”) claims against them for failure to state a claim upon which relief may be granted, pursuant to Federal Rules of Civil Procedure 12(b)(6).

MEMORANDUM OF POINTS OF AUTHORITIES

I. INTRODUCTION

The Colliers Defendants move to dismiss Plaintiff’s claims because Plaintiff has failed to state a claim upon which relief can be granted for various reasons. First, all but one of Plaintiff’s claims are entirely barred by the applicable statutes of limitations and neither the discovery rule nor equitable tolling principles apply. Plaintiff had knowledge supporting its claims and precise damages amounts no later than September 22, 2017—the date Plaintiff evicted Defendants Healthmedica, Inc. and Unifund, Inc. from the leased premises following their default. Because all but one of Plaintiff’s claims have statutes of limitations ranging from two to four years, Plaintiff has failed to state a claim upon which relief can be granted as to those claims.

Additionally, Plaintiff has failed to sufficiently plead its causes of action grounded in fraud pursuant to Federal Rule of Civil Procedure 9(b) by lumping undefined “Defendants” together in its Complaint and failing to sufficiently identify the “who, what, when and where” required to prosecute its claims for fraudulent misrepresentation, negligent misrepresentation, civil conspiracy, civil racketeering, and alleged violation of the Nevada Deceptive Trade Practices Act. Plaintiff’s contention that *all* “Defendants” took the same actions and made the same representations is without merit and fails to provide the Colliers

1 Defendants (as well as all other defendants) notice of the particular misconduct alleged.

2 Finally, Plaintiff erroneously seeks to adjudicate an alleged violation of a Texas
3 statute that has no extraterritorial effect, but failed to address its right to do so within its
4 Opposition to the Colliers' Defendants' Motion to Dismiss. Thus, Plaintiff cannot challenge
5 the Colliers' Defendants claim in this regard.

6 For these reasons, the Colliers Defendants respectfully request the Court grant their
7 Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

8 **II. ARGUMENT AND AUTHORITIES**

9 **A. All but one of Plaintiff's Claims Against the Colliers Defendants Should 10 be Dismissed Because They are Barred by the Applicable Statute of 11 Limitations.**

12 **i. *The Discovery Rule Does not Apply.***

13 The discovery rule does not apply to Plaintiff's claims in this case because the face
14 of the Complaint demonstrates Plaintiff knew it was injured as of September 2017 and even
15 took efforts to mitigate its damages by evicting Healthmedica, Inc. and Unifund, Inc.
16 (collectively, the "HM Tenants") from the Leased Premises. *See* Complaint, ¶ 23.
17 Specifically, the Complaint alleges Plaintiff and the HM Tenants signed the Lease in 2016.
18 *See* Complaint, ¶ 18; Exhibit A. The Complaint further alleges the HM Tenants subsequently
19 "defaulted on [their] obligations under the Lease by failing to pay rent and [were]
20 subsequently evicted from the Somerset Leased Premises on or about September 22, 2017."
21 *See* Complaint, ¶ 23. Thus, under Nevada law, Plaintiff's claims began to accrue no later
22 than September 22, 2017—the date Plaintiff knew it was injured and knew of facts that would
23 leave an ordinarily prudent person to investigate the matter further. *Winn v. Sunrise Hosp.*
24 *& Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012).

25 As conceded by Plaintiff, dismissal based on an expired statute of limitations is
26 appropriate where the evidence demonstrates plaintiff discovered or should have discovered
27 facts giving rise to the cause of action. *Vela v. Murphy*, No. 3:04-CV-00491-LRH (VPC),
28 2006 U.S. Dist. LEXIS 110819, at *5 (D. Nev. 2006). Plaintiff's Complaint admits Plaintiff
was aware of the HM Tenants' default and the amount of damages it claims to have suffered

1 as a result—the same damages for which it seeks recovery in this case—no later than
 2 September 22, 2017. *See* Complaint, ¶ 23. However, Plaintiff erroneously contends its
 3 claims cannot be subject to dismissal because Plaintiff was not aware of lawsuits similar to
 4 the one filed by Plaintiff until last year. Plaintiff’s position is contrary to Nevada law. The
 5 applicable test for determining when a cause of action accrued is based on “when the
 6 misconduct occurs and the party receives injury,” not when a plaintiff discovers other parties
 7 have been allegedly harmed in a similar way. *See Vela*, 2006 U.S. Dist. LEXIS 110819, at
 8 *5. Thus, by failing to investigate or otherwise pursue its claims against the Defendants for
 9 almost five years, Plaintiff has failed to exercise the due diligence required of a plaintiff. *Id.*

10 Additionally, Plaintiff contends the Colliers Defendants’ Motion to Dismiss is
 11 without merit because Plaintiff’s Civil Racketeering claim has a five-year statute of
 12 limitations and is therefore not subject to dismissal based on this ground. *See* Response, ¶
 13 14. However, the Colliers Defendants conceded this fact in its Motion to Dismiss, admitting
 14 all but one of Plaintiff’s claims can survive while the rest must be dismissed. *See* Motion to
 15 Dismiss, ¶ 8. Specifically, the following claims have statutes of limitations ranging from
 16 two to four years and thus, must be dismissed: (a) negligence; (b) respondeat
 17 superior/vicarious liability; (c) violation of Texas Business & Commerce Code § 27.01(D);
 18 (d) fraudulent misrepresentation; (e) negligent misrepresentation; (f) conversion; (g) aiding
 19 and abetting; (h) violation of Nevada’s Deceptive Trade Practices Act; (i) civil conspiracy;
 20 and (j) concert of action.

21 Accordingly, Plaintiff has failed to state a claim for which relief may be granted as
 22 to these ten causes of action and they should be dismissed as a matter of law pursuant to
 23 Federal Rule of Civil Procedure 12(b)(6).

24 **ii. *The Doctrine of Equitable Tolling Does not Apply.***

25 Plaintiff contends in the alternative the doctrine of equitable tolling applies to extend
 26 the applicable statutes of limitations for all of Plaintiff’s claims that have expired. Although
 27 Plaintiff correctly lists the factors considered by courts in deciding whether to apply the
 28 doctrine of equitable tolling, Plaintiff does not even attempt to address them. Plaintiff merely

1 contends it did not and could not have reasonably discovered facts giving rise to the claims
 2 in this case without providing any explanation. In so arguing, Plaintiff refers the Court to a
 3 single statement within the Complaint stating Plaintiff did not learn of lawsuits similar to this
 4 one until July 2021 and thus, equitable tolling should apply. However, the doctrine of
 5 equitable tolling is not invoked simply because a party fails to investigate its own claims. In
 6 fact, a court will not apply the doctrine of equitable tolling unless it is shown Plaintiff
 7 exercised diligence in investigating its claims or bringing its lawsuit. *Fausto v. Sanchez-*
 8 *Flores*, 137 Nev. Adv. Op. 11, 482 P.3d 677, 681 (Nev. 2021).

9 Additionally, the Nevada Supreme Court has recently stated “plaintiffs seeking
 10 equitable tolling ‘must demonstrate that, despite their exercise of diligence, *extraordinary*
 11 *circumstances beyond their control prevented them from timely filing their claims.*”
 12 *Salloum v. Boyd Gaming Corp.*, 137 Nev. Adv. Op. 56, 495 P.3d 513, 518 (Nev.
 13 2021)(emphasis added) (quoting *Fausto v. Sanchez-Flores*, 137 Nev., Adv. Op. 11, 482 P.3d
 14 677, 681 (Nev. 2021)). The focus of equitable tolling is “whether there was excusable delay
 15 by the plaintiff.” *Fausto v. Sanchez-Flores*, 137 Nev. Adv. Op. 11, 482 P.3d 677, 682 (Nev.
 16 2021). Plaintiff has not made such a showing.

17 As stated above, Plaintiff discovered facts sufficient to file the instant lawsuit no later
 18 than September 22, 2017. The fact Plaintiff waited to file this lawsuit until after the statute
 19 of limitations expired as to nearly all of its claims cannot be attributed to any actions or
 20 omissions of the Colliers Defendants. It is certainly not a legally sufficient reason to
 21 equitably toll the statutes of limitations applicable to Plaintiff’s claims nor does it constitute
 22 “extraordinary circumstances” necessary for this doctrine to apply. *Salloum*, 495 P.3d at
 23 518.

24 **B. Plaintiff Has Not Addressed its Erroneous Claim for Violation of Tex.
 25 Bus. & Comm. Code § 27.01(d) and Thus, it Should be Dismissed.**

26 Plaintiff has asserted a claim against Colliers Texas, Acuff, Sutherland and Everbach
 27 for alleged violation of a Texas statute—Texas Business & Commerce Code § 27.01(d). *See*
 28 Complaint, ¶¶ 89 – 96. However, Plaintiff’s claim in this regard fails as a matter of law
 because state statutes have no extraterritorial effect and Plaintiff’s Response fails to address

1 or offer any support showing otherwise. Therefore, this Court should dismiss Plaintiff's
 2 claim against Colliers Texas, Acuff and Sutherland for alleged violation of Texas Business
 3 & Commerce Code § 27.01(d) because Plaintiff has failed to state a claim upon which relief
 4 can be granted.

5 **C. Plaintiff Fails to Allege Fraudulent Misrepresentation, Negligent**
 6 **Misrepresentation, Civil Conspiracy, Civil Racketeering, and Alleged**
 7 **Violation of the Nevada Deceptive Trade Practices Act Pursuant to**
 8 **Federal Rule of Civil Procedure 9(b).**

9 Plaintiff's Complaint has failed to satisfy the heightened pleading standard required
 10 of Federal Rule of Civil Procedure 9(b), which requires Plaintiff to "state the time, place and
 11 specific content of the false representations as well as the identities of the parties to the
 12 misrepresentation." *Alan Neuman Produs., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir.
 13 1988). Plaintiff has impermissibly taken the "everyone did everything" approach in lumping
 14 all of the defendants together when making certain allegations as to representations and
 15 actions taken during lease negotiations with Plaintiff. However, a plaintiff cannot simply
 16 "lump multiple defendants together" in asserting such claims. *Destfino v. Reiswig*, 630 F.3d
 17 952, 958 (9th Cir. 2011); *see also Strategic Income Fund, LLC v. Spear. Leeds & Kellogg*
 18 *Corp.*, 305 F.3d 1293, 1296 (11th Cir. 2002).

19 Plaintiff erroneously contends its Complaint "sufficiently pleads the time and specific
 20 content of the false representations and the identifies of the parties to the misrepresentation."
 21 *See Response*, ¶ 19. In support of this proposition, however, Plaintiff cites to paragraphs
 22 within the Complaint that *do not specifically identify anyone* other than undefined
 23 "Defendants." Such allegations are insufficient under applicable law and do not provide the
 24 "who, what, when, where and how" of the conduct charged. *Vess v. Ciba-Geigy Corp. USA*,
 25 317 F.3d 1097, 1106 (9th Cir. 2003). For example, Plaintiff contends the following statement
 26 is sufficient: "For example, on or about April 2017, Defendants represented that Plaintiff
 27 Somerset 'should not doubt HealthMedica's financial potential' and encouraged Somerset to
 28 make a proposal based on HealthMedica's strong 'financial potential.'" *See Response*, ¶ 19.
 Despite quoting specific statements allegedly made by one or some of the defendants,

1 Plaintiff fails to identify *who* made the subject statements and similarly fails to identify *which*
2 *of the defendants* “encouraged” Plaintiff to make the proposal. Plaintiff should be able to
3 identify the specific defendants allegedly liable for this conduct and purported
4 “encouragement.”

5 Notably, Plaintiff admits its Complaint lumps all “Defendants” together with regard
6 to certain allegations. *See* Response, ¶ 14. However, Plaintiff defends its allegations by
7 claiming they “are grouped together because **all** the defendants made **all the same**
8 representations as Defendants were acting in concert and conspired together.” *See* Response,
9 ¶ 14. Plaintiff’s contention has no merit. The Ninth Circuit has held, “Rule 9(b) does not
10 allow a complaint to merely lump multiple defendants together but “require[s] plaintiffs to
11 differentiate their allegations when suing more than one defendant...and inform each
12 defendant separately of the allegations surrounding his alleged participation in the fraud.”
13 *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (quoting *Haskin v. R.J. Reynolds*
14 *Tobacco Co.*, 995 F. Supp. 1437, 1439 (M.D. Fla. 1998). Additionally, “[i]n the context of
15 a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role
16 of each defendant in the alleged fraudulent scheme.” *Id.* Plaintiff has failed to make such a
17 showing.

18 Plaintiff’s erroneous contention that all undefined “Defendants,” which conceivably
19 include unnamed individuals and entities, made the same representations and the same
20 actions cannot be true for several reasons. First, Everbach had no direct involvement or
21 communications with Plaintiff during lease negotiations and Plaintiff has not alleged
22 otherwise. Additionally, Defendant Healthmedica was Plaintiff’s tenant and thus,
23 communicated with Plaintiff in a different capacity than anyone at Colliers Texas. It is
24 illogical to conclude all of the “Defendants” could have made the exact same statements to
25 Plaintiff. Additionally, to the extent Plaintiff contends the statements can be attributed to
26 each other as part of a conspiracy, Plaintiff misstates the heightened pleading standards that
27 equally apply to conspiracy claims. *S. Union Co. v. Sw. Gas Corp.*, 165 F. Supp. 2d 1010,
28 1020-21 (D. Ariz. 2001).

For the foregoing reasons, Plaintiff failed to state its claims for fraudulent misrepresentation, negligent misrepresentation, civil conspiracy, civil racketeering, and alleged violation of the Nevada Deceptive Trade Practices Act with particularity and dismissal is therefore required.

D. Plaintiff Improperly Attaches Documents Outside the Complaint in Support of its Response.

In ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may only consider the allegations contained in the pleadings, exhibits attached to the complaint, documents incorporated by reference in the complaint and matters properly subject to judicial notice. *Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000 (D. Nev. 2015). Plaintiff improperly attached seven exhibits to its Response, which include a third-party contract and several e-mails exchanged between Colliers Texas employees. None of these documents were attached to Plaintiff's Complaint nor incorporated therein. As a result, the Court cannot consider them in ruling on the Colliers' Defendants' Motion to Dismiss. *Id.*

IV. CONCLUSION

For these reasons, the Court should dismiss with prejudice, and without leave to amend, the Complaint in its entirety as against the Colliers Defendants for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

DATED this 11th day of May, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Dan R. Waite

Dan R. Waite, Bar No. 4078

DWaite@lewisroca.com

3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169

Greg C. Noschese (Texas State Bar No.: 797164)
(Admitted Pro Hac Vice)

Natalie A. Sears (Texas State Bar No.: 24098400)
(Admitted Pro Hac Vice)

MUNSCH HARDT KOPF & HARR, PC
500 N. Akard Street, Suite 3800
Dallas, TX 75201

*Attorneys for Colliers International North Texas, LLC,
Robert M. Acuff, Thomas Lee Sutherland, Steve
Everbach and Colliers Nevada, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2022, I caused a true and accurate copy of the foregoing document entitled ***“DEFENDANT COLLIERS INTERNATIONAL NORTH TEXAS, LLC, ROBERT M. ACUFF, THOMAS L. SUTHERLAND AND COLLIERS NEVADA, LLC’S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)”*** to be filed with the Clerk of the Court via the CM/ECF system, which will send an electronic copy to all interested parties.

David A. Carroll, Esq.
Anthony J. DiRaimondo, Esq.
Robert E. Opdyke, Esq.
RICE REUTHER SULLIVAN & CARROLL, LLP
3800 Howard Hughes Parkway, Suite 1200
Las Vegas, Nevada 89169

Robert T. Eglet, Esq.
Tracy A. Eglet, Esq.
Danielle C. Miller, Esq.
EGLET ADAMS
400 South 7th Street, #400
Las Vegas, Nevada 89101

/s/ Luz Horvath
An employee of Lewis Roca Rothgerber Christie LLP